Director-General of Inland Revenue v Hypergrowth Sdn Bhd

HIGH COURT (KUCHING) — TAX APPEAL NO 14–02 OF 2006–II
HAMID SULTAN JC
9 JULY 2007

Revenue Law — Income tax — Capital — Sale of shares — Profit made out of sale of shares — Whether attracts s 4(a) of the Income Tax Act 1967

Revenue Law — Income tax — Capital — Sale of shares — Profit made out of sale of shares — Whether purchase and subsequent sale constituted an adventure in the nature of trade — Whether purchase and sale an isolated act — Whether transaction was the realisation of capital assets

The appellant appealed by way of case stated, pursuant to para 34 schedule 5 of the Income Tax Act 1967 ('ITA 1967'), against the decision of special commissioners. The appellant contended that the proceeds on the disposal of the shares by the respondent in Ngiu Kee were business income chargeable to income tax and that: (i) the respondent was an investment company who purchased shares in Ngiu Kee; (ii) the shares purchased were not for long term investment; (iii) the shares were disposed off; (iv) the respondent made a profit out of the sale of shares; (iv) the shares were acquired with a view to make a quick profit; and (v) the intention of the respondent to venture into the purchase of shares was in the nature of trade and in consequence attracts s 4(a) of the ITA 1967 and was liable to payment of income tax. The respondent disputed that the proceeds on the disposal of the shares in Ngiu Kee constituted capital gains which were not taxable and inter alia submitted that the respondent was established as an investment holding company and had acquired the shares in Ngiu Kee as a long term investment not for resale at a profit. The respondent had not at anytime carried on the business of trading in shares, and it could not be said that the Ngiu Kee shares were acquired/transacted as part of the 'trade' of the respondent. The respondent's investment in Ngiu Kee was an isolated investment since it had never invested in any other shares. This together with other circumstances surrounding the investment showed that the investment could not be said to be an 'adventure in the nature of trade'. The issues for determination for this appeal was that whether the respondent's purchase of shares of Ngui Kee and the sale thereafter constituted an adventure in the nature of trade which would require the profits of the sale to be subject matter

of payments of income tax; or whether the transaction was the realisation of capital assets, the proceeds of which was not subjected to ITA 1967.

Held, dismissing the appeal with costs:

(1) The respondent was at all material times an investment company and was never shown to be a company trading in shares or had the means, knowledge or expertise on such area of business. The dominant purpose for the purchase of shares was established as a matter of fact for investment purpose. Subsequently, it was sold because of unsafe market conditions. This issue was not challenged by the appellant and or no evidence was introduced by the appellant at least to show that the market was not unsteady (see para 24(a) & (b)).

(2) The sale of shares was an isolated act and there was no other evidence to think otherwise. Every case must be decided on its own facts. The crucial question here for the special commissioners was not whether the purchase of shares was made with the intention of immediate sale but whether the adventure was in the nature of trade. The special commissioners had come to conclusion based on evidence. From the primary facts admitted or proved the commissioners were right to draw the said inference leading to their conclusion. On this issue there was no erroneous assumption as to the relevant law (see para 24(c) & (d)).

[Bahasa Malaysia summary

Perayu merayu melalui kes yang dinyatakan, menurut perenggan 34 jadual 4 Akta Cukai Pendapatan 1967 ('ACP 1967'), terhadap keputusan pesuruhjaya-pesuruhjaya khas. Perayu menegaskan bahawa hasil-hasil daripada penjualan saham-saham oleh responden di Ngiu Kee adalah pendapatan perniagaan yang boleh ditaksirkan untuk cukai pendapatan dan bahawa: (i) responden adalah syarikat pelaburan yang membeli saham-saham Ngiu Kee; (ii) saham-saham yang dibeli bukanlah untuk pelaburan jangka panjang; (iii) saham-saham dijual; (iv) responden membuat keuntungan daripada penjualan saham-saham tersebut; (iv) saham-saham diperolehi dengan tujuan mendapatkan keuntungan cepat; dan (v) tujuan responden untuk membeli saham-saham tersebut adalah bersifat perdagangan dan dengan itu jatuh di bawah s 4(a) ACP 1967 dan bertanggungjawab membayar cukai pendapatan. Responden mempertikaikan bahawa hasil daripada jualan saham-saham tersebut di Ngiu Kee membentuk laba modal yang tidak boleh dikenakan cukai pendapatan dan inter ali menghujahkan bahawa responden telah ditubuhkan sebagai syarikat pemegang pelaburan dan telah memperolehi saham-saham di Ngiu Kee sebagai pelaburan jangka

masa panjang dan bukannya untuk dijual semula dengan keuntungan. Responden telah tidak pernah menjalankan perniagaan perdagangan di saham-saham, dan ia tidak boleh dikatakan bahawa saham-saham Ngiu Kee telah diperolehi/dijual sebagai sebahagian 'perdagangan' responden. Pelaburan responden di Ngiu Kee adalah pelaburan yang terasing oleh kerana ia tidak pernah melabur dalam mana-mana saham lain. Ini bersama dengan keadaan-keadaan sekeliling yang lain pelaburan tersebut menunjukkan bahawa ia tidak boleh dikatakan sebagai suatu 'kegiatan yang bersifat perniagaan'. Isu-isu untuk keputusan di rayuan ini ialah sama ada pembelian saham-saham di Ngui Kee oleh responden dan penjualan seterusnya membentuk suatu kegiatan yang bersifat perniagaan yang memerlukan keuntungan-keuntungan jualan dijadikan perkara pokok pembayaran cukai pendapatan; atau sama ada penjualan tersebut membentuk laba modal, dan hasil-hasil daripadanya tidak tertakluk kepada ACP 1967.

Diputuskan, menolak rayuan dengan kos:

(1) Responden pada kesemua masa material adalah syarikat pelaburan dan tidak pernah ditunjukkan sebagai syarikat yang berdagang di saham-saham atau mempunyai kebolehan, pengetahuan atau kepakaran dalam bidang perniagaan tersebut. Tujuan utama membeli saham-saham telah ditunjukkan sebenarnya sebagai untuk tujuan pelaburan. Selepas itu, ia telah dijual oleh kerana keadaan-keadaan pasaran tidak selamat. Isu ini tidak dicabar oleh perayu dan tiada bukti dikenalkan oleh perayu untuk menunjukkan sekurang-kurangnya bahawa keadaan-keadaan pasaran tidak selamat (lihat perenggan 24(a) & (b)).

(2) Penjualan-penjualan saham-saham adalah satu tindakan yang berasingan dan tiada keterangan yang menunjukkan selain daripada itu. Setiap kes mesti diputuskan berdasarkan fakta-faktanya sendiri. Soal penting di sini untuk pesuruhjaya khas bukannya sama ada pembelian saham-saham dibuat dengan niat untuk menjualkannya dengan segera tetapi sama ada kegiatan adalah bersifat perniagaan. Pesuruhjaya khas telah mencapai satu kesimpulan berdasarkan keterangan. Daripada fakta-fakta utama yang dilampirkan atau dibuktikan pesuruhjaya-pesuruhjaya adalah betul dalam penemuan inferens yang menghasilkan kesimpulan mereka. Atas isu ini, tiada anggapan yang silap akan undang-undang relevan (lihat perenggan 24(c) & (d)).]

Notes

For cases on capital, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2230–2231.

Cases referred to

ALF Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 5 MLJ 717 (refd)

Bukit Yew Sdn Bhd v Director-General of Inland Revenue [1987] 2 MLJ 379 (refd)

Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes) Vol V Part III TC 159 (refd)

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235 (refd)

Director General of Inland Revenue v Mamor Sdn Bhd [1982] 2 MLJ 169

Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 MLJ 415 (refd)

E v Comptroller-General of Inland Revenue [1970] 2 MLJ 117 (refd)

Edwards v Bairstow & Harrison 36 TC 207 (refd)

Iswera v Ceylon Commissioner of Inland Revenue [1995] 1 WLR 663 (refd)

Ketua Pengarah Hasil Dalam Negeri v Aneka Jasaramai Ekspress Sdn Bhd [2004] 2 MLJ 188 (refd)

Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd & Another Appeal [2006] 3 MLJ 597 (refd)

Kota Kinabalu Industries Sdn Bhd v Director General of Inland Revenue [1981] 2 MLJ 186 (refd)

Leeming v Jones (HM Inspector Taxes) Vol XV Part VTC 333 (refd)

Lim Foo Yong Sdn Bhd v The Comptroller-General Of Inland Revenue [1986] 2 MLJ 161 (refd)

Lionel Simmons Properties Ltd (in liquidation) and Others v Commissioners of Inland Revenue Vol 53 TC 461 (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713 (refd)

Marson (Inspector of Taxes) v Morton and related appeals [1986] STC 463 (refd)

Mount Pleasure Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 1 MLJ 168 (refd)

MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 7 MLJ 260 (refd)

NYF Realty Sdn Bhd v Controller of Inland Revenue [1974] 1 MLJ 182 (refd)

PUSB v DGIR [1995] 4 BLJ 281 (refd)

Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] 2 All ER 798 (refd)

Turner v Last (HM Inspector of Taxes) Vol 42 TC 517 (refd)

W Holdings Private Limited v The Comptroller of Income Tax [1992] 1 MSTC 5 (refd)

Legislation referred to

Income Tax Act 1967 ss 2, 4(a), schd 5 para 34

Liz Ellyna Mohd Zaid (Legal Officer) (Inland Revenue Board Malaysia, Kuala Lumpur) for the appellant.
Cheng Hui Hong (Cheng & Cheng) for the respondent.

Hamid Sultan JC:

[1] This is my judgment in respect of the appeal by the appellant by way of case stated, pursuant to para 34 schedule 5 of the Income Tax Act 1967 ('ITA 1967'), against the decision of Special Commissioners who had ruled that: (i) the respondent's investment in Ngiu Kee Corporation (M) Bhd ('Ngiu Kee') was made as a long term investment. (ii) the respondent was not at any time a trader in shares nor were the shares in Ngiu Kee acquired as part of the respondent's trade; (iii) the respondent's investment was not undertaken as an 'adventure in the nature of trade', for a profit seeking motive.

[2] The parties rely on the following authorities:

(i) *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235;

(ii) *Edwards v Bairstow & Harrison* 36 TC 207;

(iii) *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713;

(iv) *NYF Realty Sdn Bhd v Controller of Inland Revenue* [1974] 1 MLJ 182;

(v) *W Holdings Private Limited v The Comptroller of Income Tax* [1992] 1 MSTC 5 135;

(vi) *PUSB v DGIR* [1995] 4 BLJ 281;

(vii) *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd & Another Appeal* [2006] 3 MLJ 597;

(viii) *ALF Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2005] 5 MLJ 717;

(ix) *Lim Foo Yong Sdn Bhd v The Comptroller-General Of Inland Revenue* [1986] 2 MLJ 161;

(x) *Bukit Yew Sdn Bhd v Director-General of Inland Revenue* [1987] 2 MLJ 379;

(xi) *Mount Pleasure Corp Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 1 MLJ 168;

(xii) *E v Comptroller-General of Inland Revenue* [1970] 2 MLJ 117;

(xiii) *Iswera v Ceylon Commissioner of Inland Revenue* [1995] 1 WLR 663; A

(xiv) *Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 MLJ 415;

(xv) *Kota Kinabalu Industries Sdn Bhd v Director General of Inland Revenue* [1981] 2 MLJ 186; B

(xvi) *Director General of Inland Revenue v Mamor Sdn Bhd* [1982] 2 MLJ 169;

(xvii) *Ketua Pengarah Hasil Dalam Negeri v Aneka Jasaramai Ekspress Sdn Bhd* [2004] 2 MLJ 188; C

(xviii) M*R Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2005] 7 MLJ 260;

(xix) *Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners* [1980] 2 All ER 798; D

(xx) *Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes)* Vol V Part III TC 159;

(xxi) *Leeming v Jones (HM Inspector Taxes)* Vol XV Part V TC 333; E

(xxii) *Lionel Simmons Properties Ltd. (in liquidation) and Others v Commissioners of Inland Revenue* Vol 53 TC 461;

(xxiii) *Marson (Inspector of Taxes) v Morton and related appeals* [1986] STC 463; F

(xxiv) *Turner v Last (HM Inspector of Taxes)* Vol 42 TC 517.

[3] The appellant's complaint before this court can be summarised as follows: (i) the respondent is an investment company (ii) it purchased shares in Ngiu Kee (iii) the shares purchased were not for long term investment. (iii) the shares were disposed off (iv) the respondent made a profit out of the sale of shares (iv) the shares were acquired with a view to make a quick profit (v) the intention of the respondent to venture into the purchase of shares was in the nature of trade and in consequence attracts s 4(a) ITA 1967 and is liable to payment of income tax. G H

[4] The respondent's contention before the Special Commissioners can be summarised as follows: (i) the purchase of the shares of Ngui Kee was asset in the nature of investment (ii) it was meant to be a long term investment (iii) there was no intention to resell the shares immediately for profit and this was an investment scheme and not a profit making scheme (iv) it was an isolated act and did not have an organised structure in terms of employees and I

resources to carry out share trading activities (v) the respondent was forced to sell the shares because of unstable market conditions which was not anticipated at the time of purchase.

[5] The issues for determination for this appeal is that whether the respondent's purchase of shares of Ngui Kee and the sale thereafter constitute an adventure in the nature of trade which will require the profits of the sale to be subject matter of payments of income tax; or whether the transaction was the realisation of capital assets, the proceeds of which is not subject to ITA 1967. The issues for determination before the commissioners were framed as follows:

> Issue for our determination is whether the proceeds on the disposal of the shares in Ngiu Kee Corporation Berhad (Ngiu Kee) constitute capital gains which are not taxable, or business income chargeable to income tax under s 4(a) of the Income Tax Act 1967 ('the Act').

[6] Before the Special Commissioners, the following facts were admitted:

(a) the appellant was incorporated on 8 December 1994 under the Companies Act 1965 ('CA 1965') and was at all material times controlled by Dr Samuel anak Kiyui, who owed 91% of the share capital and is a veterinarian and was not a trader or expert in shares dealing;

(b) one of the objects of the appellant since its inception inter alia include 'take, buy or otherwise acquire shares, stocks, debentures or other securities issued by any other company to invest upon or without security and deal with the moneys of the company in such manner as may from time to time be determined and to hold any such shares securities or investments or at any time or times to sell realise and to re-invest the proceeds;

(c) the appellant first acquired 2,970,000 ordinary shares of RM1 each in Ngui Kee Berhad for a consideration of RM6 million and subsequent to a capital reduction, shares swapped with Ngiu Kee, and a rights issue, the appellant held 4,189,186 shares in Ngiu Kee on 16 February 1997, the disposal gains on which is the subject of this appeal. The appellant also acquired another 548,659 Ngiu Kee shares on 16 February 1997 via a special issue, the disposal of which is not the subject of this appeal;

(d) Ngiu Kee was listed on the second board, Kuala Lumpur Stock Exchange on 9 June 1997 and the issue price was RM2.60 per share. The listing of Ngiu Kee was necessary in order to raise financing for the expansion of Ngiu Kee's operations;

(e) the appellant entered into agreement on 26 June 1997 with Wang Chung-Chi for the sale of 4,189,186 shares in Ngiu Kee for RM16,756,744. The sale was triggered by the sudden and unanticipated deterioration in the local and regional economy, and fears of further deterioration that may result in total loss;

(f) on 11 February 1999 the appellant entered into a Members Voluntary Liquidation and Dr. Samuel Anak Kiyui was appointed as the liquidator of the company;

(g) the respondent issued two notices of assessment (Form J), ie for Years of Assessment ('YsA') 1998 and 1999 both dated 14 April 1999, together with the computation of statutory income for the respective years. In addition, the respondent assessed the appellant twice on the same disposal of shares, with both the notices of assessment (Form J) for YsA 1998 and 1999 being assessments raised for the gain on disposal of the 4,189,186 shares. The Form J for YA 1998 in particular was based on incorrect disposal price and acquisition cost;

(h) the appellant being dissatisfied with the said assessments, filed a notice of appeal to the Special Commissioners Of Income Tax (Form Q) on 14 July 1999. AND the following facts were proved:

(a) the appellant did not carry on any trading in shares and this is essentially a case of isolated investment in shares. The appellant had never undertaken any prior activity in shares and has not organised itself in terms of employees and resources in such a way as to indicate it intends to carry out share trading activities.

(b) the intention of the appellant in acquiring the shares were to hold the same as long term investment, based on evidence relating to Dr Samuel's intention, as the controlling shareholder and governing director of the appellant:

(i) to have an alternative income stream to his usual occupation as a veterinarian;

(ii) to be a proud part-owner of a potentially expanded Ngiu Kee group and

(iii) to eventually pass down this investment to his family/successors.

(c) when the appellant acquired the shares, it never had the intention to resell such shares at a profit and this was not a profit-making scheme. The opportunity to invest came through Dr Samuel's close friendship with Philip Tang, eldest son of the founder of Ngiu Kee and was acquired and sold with no special organization/resources/consultants.

(d) the listing of Ngiu Kee was clearly for some other purpose i.e. for raising financing for the expansion plans for Ngiu Kee.

(e) the sale was triggered by the sudden and unanticipated deterioration in the local and regional economy, and fears of further deterioration that may result in total loss.

[7] I take the view that law in respect of this appeal relating to taxation is quiet straight forward, provided it is analysed in the right perspective, and for that purpose it may be summarised as follows:

[8] The appellate court can only disturb the finding of fact in a limited circumstance. In *Edwards v Bairstow & Harrison* 36 TC 207, the High Court and the Court of Appeal asserted that the question whether or not the transaction was an adventure in the nature of trade is one purely of fact and that finding by Special Commissioners cannot be disturbed on appeal. However, the House of Lords in that case created limited exception to this principle. Lord Viscount Simonds opined:

> Before, however, examining the authorities in any detail, I would make it clear that in my opinion, whatever test is adopted, that is whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of a question of law or of mixed law and fact, the same result is reached in this case. The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the Court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.

In the same case Lord Radcliffe opined:

> I think it possible that the English Courts have been led to be rather overready to treat these questions as 'pure questions of act' by some observations of Warrington and Atkin, LJJ., in *Cooper v Stubbs* 10 TC 29 If so, I would say, with very great respect, that I think it a pity that such a tendency should persist. As I see it, the reason why the courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine

those facts with a decent respect for the tribunal appealed from, and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

I agree that the appeal should be allowed.

[9] The scope and limitation of appellate jurisdiction as enunciated by the House of Lords have been followed in a number of cases. In *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235, Lord Diplock opined:

From the primary facts admitted or proved the Commissioners are entitled to draw inferences: such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact: but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law.

[10] In my view, the scope and restriction placed on the appellate courts is to a large extent similar to hearing of other appeals. That is, appellate court will be reluctant to reverse the finding of the facts of the trial court, unless the trial court has not given satisfactory reasons or the findings are not supported by evidence or proper evidence. The appellate court will not normally disturb the findings of the lower court in respect of an issue which was dependent on evidence and fact as opposed to an issue of law.

[11] The difficulty in s 4 of ITA which has led to veritable explosion of cases and appeals is not difficult to fathom because ITA 1967 does not define specifically 'gain or profits from business' and the liability to pay income tax originates from this provision. Thus, when objection is taken by taxpayer that he was not trading, then the matter has to be decided as a matter of fact by the Special Commissioners at the expense and effort of the taxpayer. The legal burden is on the taxpayer to demonstrate that the gains or profit is not business income which is chargeable to income tax. The definition of business in ITA 1967 is like generic term in nature. Section 2 of ITA 1967 defines business as 'business' includes profession, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment'. What amounts to trading to be equated to business is often obscure and will depend on its own facts. There are a number of cases which have attempted to throw light on this aspect. In *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713, Edgar Joseph Jr, sitting in the Supreme Court, made the following observations:

That, however, is not the end of the matter, for intentions may be changed, and so the specific question of critical substance is whether when between 1969 and 1972 the taxpayer had entered into the three related transactions with the developer (a non-member as evidenced by the contemporary agreements hereinbefore mentioned), it had engaged in a trade or an adventure in the nature of trade. We are supported in this by what the Privy Council said in *Lim Foo Yong Sdn Bhd*, namely, that what was vital was the intention of the taxpayer and whether the intention remained the same.

What is trading?

This bring us to the question: What is trading?

In *Ransom v Higgs*, Lord Reid said (at p 955d):

> The Income Tax Acts have never defined trade or trading farther than to provide that trade includes every trade, manufacture, adventure or concern in the nature of trade. As an ordinary word in the English language 'trade' has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but it is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services.
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> ... As there is no limiting definition trade has been held to include cases where some element is absent which is normally present in trading.

In *E v Comptroller-General of Inland Revenue*, at p 122 col 1H-I, Gill FJ speaking for the Federal Court said this:

> Whilst a trade usually consists of a series of transactions implying some continuity and repetition of acts of buying and selling or manufacturing and selling, in view of the definition of 'trade' in the English Income Tax Act [1962] which I have mentioned above, the mere fact that there is only one transaction does not preclude the possibility that that transaction is in the nature of a trade. Thus, one single purchase and sale or one purchase and many sales have been held in the English and Scottish courts to be trading (see 20 *Halsbury's Laws of England* (3rd Ed) para 213 at p 119).

In *Simmons v IRC* at p 800, Lord Wilberforce answered the question 'what is trading', in the following passage, part of which we have earlier reproduced:

> One must ask, first, what the commissioners were required or entitled to find. Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intention may be changed. What was first an investment may be put into the trading stock, and, I suppose, vice versa. If findings of this kind are to be made precision is required,

since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax (cf *Sharkey (Inspector of Taxes) v Wernher* [1955] 3 All ER 493; [1956] AC 58). What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor for it to possess an indeterminate status, neither trading stock nor permanent asset. It must be one or the other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely, that situations are open to review.

In *Cunliffe v Goodman*, at p 253, Lord Asquith speaking about what in law amounts to an intention said this:

An 'intention' to my mind connotes a state of affairs which the party 'intending' — I will call him X — does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.

X cannot... 'intend' a result which is wholly beyond the control of his will.

And at p 254, paras 2 and 3, his Lordship added this:

This leads me to the second point bearing on the existence in this case of 'intention' as opposed to mere contemplation. Not merely is the term 'intention' unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile.

A purpose so qualified and suspended does not in my view amount to an 'intention' or 'decision' within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision.

[12] To arrive at the decision what amounts to trading and/or carrying on a business so as to distinguish between taxable and non-taxable income, courts have set out some guiding principles for assessment under the following heads namely (i) subject matter of the transactions; (ii) profit-seeking motive (iii) way in which the asset was acquired (iv) mode of financing (v) trading interests in the same or similar field (vi) period of ownership (vii) frequency of transaction (viii) alteration of property to make it more saleable (ix) methods employed for the sale (x) circumstances responsible for the sale (see *Leeming v Jones* 15 TC 333, *NYF Realty Sdn Bhd v Controller of Inland Revenue* [1974] 1 MLJ 182 and *Marson v Morton*

[1986] STC 463). All the propositions stated in the English cases have been eloquently summarised by Sharma J in *NYF Realty Sdn Bhd* in the following manner:

> Most of the cases which have been decided on the subject have involved the application of the first of the above requirements. In determining the application of these requirements the focal point of enquiry is the dominant purpose for which the particular property was originally acquired. If it is established that the dominant purpose in the acquisition of property was its resale at a profit, the presence of other purposes, such as the rental of that property does not remove any profit on ultimate sale from the taxable area.
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> Again the mere presence of an intention to sell property at a profit at some future date is not, of itself, sufficient to cause the profit to be taxable if the dominant motive in purchasing the property was not expectation of profit by sale.
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> It has been said that 'the criterion for distinguishing between capital and income is flexible, if not vague, and for that reason unsatisfactory.' Transactions in property carried out by established businesses seldom give rise to any difficulty if the property concerned is of the type normally dealt with by the business. The profits of the sale are clearly income rather than capital. If the property concerned has been used in the business as fixed assets such as land and buildings the profits of sale are normally capital and non taxable except to the extent that any recovery of depreciation previously allowed or allowable may be included in the income. The mere fact that property which has been used in a business is resold at a profit does not cause the profit to be taxable as 'from the carrying on of a profit making undertaking' since the profit making undertaking of a business only incidentally involves the resale of its fixed assets.
>
> The following criteria for distinguishing between taxable and non taxable selling profits are useful in determining the question:
>
> (1) Subject matter of the transaction.
>
> Property which does not yield income or personal enjoyment to its owner merely by virtue of its ownership, and which is normally the subject of trading and rarely the subject of investments, is more likely to have been acquired for the purpose of resale at a profit than property which does yield such income or enjoyment;
>
> (2) Period of ownership.
>
> The fact that property is held for but a short time after its acquisition may tend to indicate that the purpose of acquisition was resale at a profit;
>
> (3) Frequency of transactions.
>
> If there had been a number of transactions in the same kind of property it may be presumed that the taxpayer's purpose in purchasing the particular property was its resale at a profit;

(4) Alteration of property to render it more saleable. A

The fact that material alterations or improvements have been made to property or that its character or quality has been changed so as to render it more merchantable would tend to indicate that the property was derived from a profit making undertaking or scheme. However, if the property was clearly acquired for other purposes, extensive activities to render it more saleable after it is no longer useful for such original purposes would not cause any selling profit to be taxable; B

(5) Methods employed in disposing of property.

If special exertion is made to find or attract purchasers such as the opening of an office or advertising extensively, such facts tend to indicate the presence of a profit making undertaking. However, such facts would not of themselves cause the profit to be taxable if the original purpose in acquiring the property was to use it rather than to resell it at a profit; C D

(6) Circumstances responsible for sale.

If sale of property is occasioned by sudden emergency or unanticipated need for funds, such facts will tend to indicate that the property was not acquired for the purpose of resale at a profit and that the sale was not pursuant to a profit making undertaking or scheme. E

[13] The appellant contends that the proceeds on the disposal of the shares in Ngiu Kee were business income chargeable to income tax under s 4(a) of the ITA. The appellant before the Special Commissioners had contended: F

(a) based on the object clause, it clearly shows that the appellant was incorporated for the purpose of carrying on a business for the acquisition of shares for its members and any gainful use to which it puts its assets, prima facie amounts to the carrying on of a business. G

(b) the respondent's intention in purchasing the shares was not for investment but for trading. This is due to the fact that there is a condition in the agreement entered into between the respondent and Ngiu Kee in which the latter is to appoint Arab Malaysian Merchant Bank Berhad (AMMB) to make an application to the KLSE for listing of the latter's shares. H

(c) the respondent had no financial ability to acquire the shares for a long term investment. This is due to the fact that the paid up capital of the respondent was merely RM100. The loan which was obtained by the respondent from its governing director indicates that the respondent had an intention to purchase the shares and resell them at a profit. I

(d) the respondent sold the shares immediately after the shares being listed on the Second Board in the KLSE ie, 17 days after listing and the shares were held by the appellant for about 4–12 months only. The profits from the sale of shares were not reinvested in other investment as what normally an investment holding company does but the profits were used to pay the loan from its director.

(e) the respondent later liquidated the company after the sale of the whole shares, instead of acquiring new share. AND inter alia submits as follows:

(f) hence, the appellate court can intervene with the decision of the Special Commissioners in the following grounds:

(i) misconception of law;

(ii) conclusion of law which cannot be supported by the primary facts; and

(iii) conclusion of mixed fact and law that no reasonable Special Commissioners could have reached of they had correctly directed themselves.

(g) the appellant says that:

(i) the conclusion made by the Special Commissioners that the shares were acquired for long term investment was not supported by facts and also inconsistent with the facts proved before them.

(ii) the conclusion by the Special Commissioners that the investment in Ngiu Kee shares was not an adventure in the nature of trade was also inconsistent with the facts proved before them. And for this proposition, the appellant relies on *NYF Realty Sdn Bhd* where Sharma J opined:

> The question of what the intention of a taxpayer was when he acquired an asset, ie, whether he bought it as an investment or with a view to selling it at a profit, is a question of fact. It has to be determined by inference from proved facts and such inference is one of fact and not of law.

[14] On this issue, the appellant contends that it was the duty of the Special Commissioners to have considered every relevant fact both for and against the appellant with due care and if they failed to take into consideration some material evidence or had overlooked some crucial fact, their act amounted to a misdirection in law. In such an event, it is the duty of the court to interfere and in a proper case, the decision of the Special Commissioners can be set aside on that ground.

[15] Further, the appellant contends that the respondent did not have the financial ability in acquiring the shares as long term investment as the respondent started off with a paid up capital of RM100 only and relies on the case of *W Holdings Private Limited v The Comptroller of Income Tax* [1992] 1 MSTC 5, 135, where the court observed:

> WHL had a paid-up capital of $2 only. It had no money of its own whatsoever to invest in shares and properties. All the shares and properties which were acquired by the company were financed with an overdraft from its bank and loans from its director. W said in his evidence that the company was set up to derive income from shares and properties. Could a company with no capital of its own acquire shares and properties for long term investment with moneys obtained from a bank overdraft? The Board did not think so.

[16] On this issue, the appellant contends that even though the loan was free from interests, and terms of repayment had not been fixed, it does not change the liability of the respondent to repay the loan. The appellant concludes that the method of financing in the present case has clearly indicated that the intention of the respondent was to make a quick profit from the disposal of shares and definitely not for a long term investment. The appellant relies on the case of *Turner v Last* 41 TC 511 where it was observed:

> Of course, the mere fact that when you buy property as well as intending to use and enjoy it, you have also in your mind the possibility that it will appreciate in value, and that a time may come when you may want to sell it and make a profit on it, does not of itself make you a trader; but if the position is that you intend to sell it as soon as you can to recover the cost of the purchase, the position is obviously very different...

[17] Further, the appellant says that the way through which the shares were acquired clearly indicates that a plan or scheme is being carried out by the respondent to acquire the shares with a view to make a quick profit from its immediate disposal and is not actually to acquire with an intention to hold them as a long term investment. This inference is fortified by subsequent voluntary winding up of the respondent soon after the shares were disposed. To assert the argument, the appellant relies on the case of *W Holdings Private Limited* and the case of *PUSB v DGIR* [1995] 4 BLJ 281, where the Special Commissioners has stated:

> The facts also show that PP1, besides holding posts in SEDC and its subsidiary companies, had vast experience in corporate affairs and a sound knowledge of the business world, had acquired a dormant company, ie, a RM2 company and with his business acumen and through and through his business acquaintances had managed to raise a loan of RM1.2m which was rather a very substantial sum for a shelf company like the appellant's...

[18] Further, the appellant contends in reliance of the Court of Appeal's decision in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd & Another Appeal* [2006] 3 MLJ 597, wherein the Court of Appeal held that the intention of a person must be gathered from the surrounding circumstances and says that the Special Commissioners has failed to come to the right conclusion as they had failed to consider the whole surrounding facts of the case. This point was dealt with in the Court of Appeal in the case of *ALF Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2005] 5 MLJ 717, where Mokhtar Sidin JCA opined:

> To come to a safe conclusion one has to go into activities of the appellant whether in the past or in the present to find out whether the activities are one of the stated object... In order to come to a correct conclusion we have to see what was the intention of the appellant when they purchased the subject land; whether the property was to be kept for long-term investment or whether it was purchased and to be resold at a profit as soon as possible or to be developed and to be sold in the developed form and made profit from the transaction.

[19] Further, the appellant says that the Court of Appeal had also referred to the Privy Council in *Lim Foo Yong Sdn Bhd v The Comptroller-General Of Inland Revenue* [1986] 2 MLJ 161 in respect of the circumstances in which a court can interfere with the decision of the Special Commissioners. In this instance, it was held that:

> The Special Commissioners are, of course, as the Federal Court rightly observed, the judges of fact, but in finding the facts and drawing the inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value. In their Lordship's judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.

[20] On the issue of the Special Commissioners' statement at p 14 of the Case Stated the audited accounts of the respondent described the principal activity of the respondent as that of investment holding and the balance sheet categorised the shares in Ngiu Kee as investment. The appellant says that such statement by the Special Commissioners is not considered as 'facts proved' in the Case Stated. As such, it is not clear whether such treatment in the account was proven before them. In any event, the treatment in the accounts is not conclusive and relies on the case of *Bukit Yew Sdn Bhd v Director-General of Inland Revenue* [1987] 2 MLJ 379 where it was stated:

> the way in which the company keeps its accounts may be evidence of the company's intention. But such evidence must be weighed against other evidence to decide the nature of the transaction.

[21] The appellant also relies on the case of *Mount Pleasure Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 1 MLJ 168, where the Court of Appeal held:

> The appellant's intention or motive alone could not prevail over what the appellant in fact did. Whiteman on Income Tax, 3rd Ed says at p 165:
>
> As a general proposition the test of whether trading has occurred is objective. Thus, the actions and methods of the alleged trade need to be considered rather than motives and intentions of the alleged trader in adopting those methods.
>
> Thus, to ascertain the business of the appellant, we must look at what business it actually carries on and not what business it professes to carry on (I Investment Ltd v CIR).

The appellant also cites the case of *E v Comptroller-General of Inland Revenue* [1970] 2 MLJ 117, where it was stated:

> Every case must naturally be decided on its own facts, but the crucial question is not whether the purchase was made with the intention of resale but whether the adventure was in the nature of trade.

[22] The appellant contends relying on various assumptions and propositions to find liability against the respondent, much of which I do not wish to set out as I see it more as an emotional submission rather than one anchored with merits.

[23] The respondent disputes that the proceeds on the disposal of the shares in Ngiu Kee constitute capital gains which are not taxable and inter alia submit as follows:

(a) the respondent was established as an investment holding company and had acquired the shares in Ngiu Kee as a long term investment not for resale at a profit. The respondent had not at anytime carried on the business of trading in shares, and it cannot be said that the Ngiu Kee shares were acquired/transacted as part of the 'trade' of the respondent. The respondent's investment in Ngiu Kee was an isolated investment since it had never invested in any other shares. This together with other circumstances surrounding the investment shows that the investment cannot be said to be an 'adventure in the nature of trade', based on an analysis of the badges of trade as enunciated in the case of *Leeming v Jones*, *NYF Realty Sdn Bhd* and *Marson v Morton* [1986] STC 463.

(b) The respondent says that the finding of facts by the Special Commissioners is final and conclusive.

[24] I have read the case stated and submissions of the parties in detail. I have also outlined the principles relating to this area of law in the earlier part

of the judgment. The appellant has failed to demonstrate that the Special Commissioners' decision was based on the misconception of the law or their conclusion cannot be supported by the primary facts; and that conclusion on the mixed fact and law in this case was such that no reasonable Special Commissioners could have reached it if they had correctly directed themselves. My reasons are as follows:

(a) The respondent was at all material times an investment company and was never shown to be a company trading in shares or had the means, knowledge or expertise on such area of business.

(b) The dominant purpose for the purchase of shares was established as a matter of fact for investment purpose. Subsequently, it was sold because of unsafe market conditions. This issue was not challenged by the appellant and or no evidence was introduced by the appellant at least to show that the market was not unsteady. When saying this, I am mindful of the fact that the legal burden before the Special Commissioners solely rests with the respondent. The Special Commissioners has accepted the evidence of the respondent as there was no other evidence to rebut the same.

(c) The sale of shares was an isolated act and there was no other evidence to think otherwise.

(d) Every case must be decided on its own facts. The crucial question here for the Special Commissioners is not whether the purchase of shares was made with the intention of immediate sale but whether the adventure was in the nature of trade. The Special Commissioners have come to conclusion based on evidence. From the primary facts admitted or proved the Commissioners were right to draw the said inference leading to their conclusion. On this issue there was no erroneous assumption as to the relevant law.

[25] For reasons stated above, I dismiss the appeal with costs. The costs of the getting up fee shall not exceed RM10,000. If costs cannot be agreed the respondent is at liberty to tax his costs. I hereby order so.

Appeal dismissed with costs.

Reported by Sally Kee